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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. .....

FLAGG BROTHERS, INC., Individually and as Representative of a Class of All Others Similarly Situated, HENRY FLAGG, Individually and as President of Flagg Brothers, Inc., THE AMERICAN WAREHOUSEMEN'S ASSOCIATION, THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC., and LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Petitioners,

v.

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, Individually and on Behalf of All Others Similarly Situated, and WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC., and THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK,

Respondents.

MEMORANDUM OF RESPONDENTS, WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC., and THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK IN RESPONSE TO AND IN SUPPORT OF THE THREE PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED HEREIN

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976.

NO.

FLAGG BROTHERS, INC., Individually and as Representative of a Class of All Others Similarly Situated, HENRY FLAGG, Individually and as President of Flagg Brothers, Inc., THE AMERICAN WAREHOUSEMEN'S ASSOCIATION, THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC., and LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, Individually and on Behalf of All Others Similarly Situated, and WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC., and THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK,

Respondents.

MEMORANDUM OF RESPONDENTS, WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC. AND THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK (HEREINAFTER REFERRED TO AS "THE RESPONDENT ASSOCIATIONS") IN RESPONSE TO, AND IN SUPPORT OF THE SEVERAL PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED HEREIN AS MORE PARTICULARLY HEREINAFTER SET FORTH.

BACKGROUND.

Three petitions have been filed for a writ of certiorari. One petition was filed by defendants Flagg Brothers, Inc. and Henry Flagg, another petition was filed by intervening defendants, American Warehousemen's Association and the International Association of Refrigerated Warehouses, Inc. and still another petition was filed by intervening defendant, the Hon. Louis J. Lefkowitz, Attorney General of the State of New York (not necessarily in that order). The Respondent Associations are intervening defendants and appellees in the Court of Appeals proceeding below and although they are vitally interested in and concerned with these petitions and the relief sought thereby, they have, in the interests of avoiding needless and burdensome repetition, chosen not to file yet another petition but instead, to manifest their position by filing this memorandum in accordance with the last sentence of Supreme Court Rule 21 Subdivision 4 which states: "All parties other than the petitioner shall be respondents, but respondents who support the position of the petitioner shall meet the time schedule for filing papers which is provided for the petitioner, *except that any response by such respondents to the petition shall be filed as promptly as possible after receipt of the petition.*" (Emphasis added.)

OPINIONS BELOW.

For the aforesaid reasons of avoiding duplication, the Respondent Associations have refrained from including an appendix inasmuch as the opinions below both of the United States Court of Appeals and of the United States District Court for the Southern District of New York are set forth in the appendices of the petitions filed by the petitioners Flagg, et al. and the Attorney General of the State of New York.

QUESTION PRESENTED.

Does a warehouseman's exercise of nonjudicial sale to enforce his lien in a manner specified by State statute, Uniform Commercial Code (U.C.C.) Section 7-210, *Subdivision 2* constitute action "under color of State Law" within the meaning of 42 U.S.C. Section 1983 or State action under the Fourteenth Amendment? The question as thus propounded is substantially the same as the question as articulated by the Attorney General in his petition except that he made reference merely to Section 7-210, U.C.C. and failed to specify Subdivision 2. Similarly, in the petition filed by The American Warehousemen's Association and The International Association of Refrigerated Warehouses, Inc., the first question framed (p. 4) omitted to specify that only Section 7-210, *Subdivision 2* is at issue. Only in the petition of Flagg Brothers, Inc. and ano. (p. 2), at least in the first question propounded, is Subdivision 2 of Section 7-210, U.C.C. expressed. However, in the second question therein propounded, the petitioners have again fallen into error in referring, generally, to "The warehouseman's right of lien sale under the Uniform Commercial Code" without stating that only one type of lien sale is involved - that prescribed in Section 7-210, *Subdivision 2,* U.C.C.

REASONS FOR GRANTING WRIT.

The Respondent Associations subscribe to the points urged by the petitioners, The American Warehousemen's Association, and ano. at pp. 7 to 10, inclusive, of their petition with the following comment: In point I of the aforesaid petition the conflict between the decision below and that of the United States Court of Appeals for the Ninth Circuit in *Melara vs. Kennedy*, 541 Fed. 2nd 802 is mentioned. This conflict has been aggravated by the decision of *Cox vs. Timm,* Uni-

ted States Court of Appeals for the Eighth Circuit, decided May 12, 1977 ___ Fed. 2nd ____, 45 U.S.L.W. 2575 in which the element of "state action" was found thus, at least ostensibly, supporting the decision of the Second Circuit below.

The Respondent Warehouses do not agree with the manner in which point II of the aforesaid petition is stated (p. 8). Neither the warehouseman's lien per se (Section 7-209, Uniform Commercial Code) nor the method of enforcement of a warehouseman's lien confined to commercial warehousemen (as distinguished from warehousemen who store household furnishings and the like) by virtue of Section 7-210 (1) of the Uniform Commercial Code has been constitutionally challenged below. It is only with respect to the method of enforcement available to all classifications of public warehousemen set forth in Section 7-210, *Subdivision 2,* Uniform Commercial Code, that constitutionality has been challenged. The Respondent Associations, however, do agree with the proposition that this second method of enforcement at issue is of vital importance to commercial warehousemen as well as household furnishings warehouses, and that an invalidation of this procedure can well impede the flow of commerce.

In addition, the section at issue, Section 7-210 (2), U.C.C., is a statute of national significance and consequence inasmuch as it has been enacted in fifty states and the District of Columbia.

CONCLUSION.

The several petitions for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted on the grounds that:

(a) Decisions of three Courts of Appeals

are in conflict on the same matter; and

(b) The Court of Appeals for the Second Circuit has not only decided an important question of Federal law under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. Section 1983, but one that involves the Uniform Commercial Code, a statute that is in effect in all fifty states and in the District of Columbia, and is, therefore, a statute of national significance.

Respectfully submitted,

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